IN THE HIGH COURT OF DELHI

RSA.No.119/2001 & C.M. No.531/2003

Sh. Ishwar Lal Shah ..... Appellant
! through: Mr. Kuljit Rawal, Advocate

VERSUS

$ Smt. Prem Lata Tiwari ..... Respondent
^ through: Mr. Ravi Sikri, Advocate
Mr. Saket Sikri, Advocate

RESERVED ON: 16.11.2007

% DATE OF DECISION: 07.12.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Following substantial question of law is being considered:-

> "Whether on the evidence on record view taken by the courts below is legal and valid?"

2. The above captioned second appeal arises out of the judgment and decree dated 23.2.2001 passed by the learned Additional District Judge Delhi whereby the judgment and

decree dated 15.11.1999 passed by the learned Civil Judge Delhi in the favour of the respondent was confirmed.

3. Brief facts necessary to dispose of the present appeal are that the respondent filed a suit for perpetual injunction against the appellant. Material averments in the plaint were that:-

I. The defendant was the owner of the property bearing Municipal No. 30/4, Nangia Park, Shakti Nagar, New Delhi (hereinafter referred to as the suit property).

II. Defendant was a tenant in respect of a shop, veranda and store situated in the front side of the suit property and a room and bathroom situated in the rear side of the suit property.

III. Front portion consisting of shop, veranda and store was let out to the defendant for commercial purposes while the rear portion consisting of a room and bathroom was let out for residential purposes.

IV. At the time of filing of the suit defendant was paying rent @ Rs.400/- per month in respect of both the portions.

V. That the tenant could not sublet, assign or otherwise

part with the possession of the tenanted premises and that he could also not make any additions, alterations or constructions in the tenanted premises without the prior consent of the respondent.

VI. Defendant was contemplating subletting the tenanted premises after effecting alterations and additions in the tenanted premises and was threatening to change the user of the rear portion of the tenanted premises from residential to commercial.

VII. Thus the suit was filed by the respondent seeking a decree of perpetual injunction against the appellant restraining appellant from subletting the tenanted premises, making alterations/additions in the tenanted premises and changing the user of the rear portion of the tenanted premises.

4. Relevant portion of the plaint reads as under:-

> "2. That the defendant is a tenant under the plaintiff in respect of one shop, one veranda out side the said shop and a store and one room and a bath room situated on the rear side of the property on the ground floor and forming part of the aforesaid property. The shop, veranda and store were let out to the defendant for non residential purposes. The room and the bath

room were let out to the defendant for residential purposes alone. The shop etc. has been used for commercial purposes alone. The room and the bath room has been used for the residential purposes alone. The portion in the tenancy of the defendant are shown in red colour in the site plan attached and the defendant pays Rs.400/- per month on account of rent for the portions of the premises in his tenancy."

5. Appellant denied the averments made in the plaint.

Defence set up by the appellant was that:-

I. Tenanted premises was let out to the father of the appellant Late Sh. Shadi Lal.

II. After the death of his father appellant being the legal heir of his father has inherited the tenancy rights in respect of the suit property.

III. Entire tenanted premises comprising of the front and rear portion was let out to the father of the appellant for composite purposes.

6. Relevant portion of the written statement reads as under:-

"Para 2 of the plaint is correct only to the extent that the defendant is a tenant under the plaintiff in respect of shop, store, veranda, room and bathroom on the ground floor of the property and the said portion was taken on rent by the father of the defendant for composite purposes i.e. residential cum commercial from the father of the plaintiff. Rest of the averments as stated are wrong and denied. The tenanted portion was taken on rent for residential cum commercial purposes and the defendant has a right to use the tenanted premises for residential

purpose or commercial purpose and the plaintiff has no right to raise objection against the use of the property either for residential purpose or for commercial purpose or for both the purposes. The plaintiff has not correctly stated the facts. The defendant has a right to use any portion of the tenanted premises for commercial purpose or residential purpose according to his convenience and the plaintiff cannot raise any objection against the user of particular portion for particular purpose.

3. Para 3 of the plaint as stated is not correct and as such the averments are denied. The premises were not let out by the plaintiff to the defendant nor the terms were settled between the plaintiff and the defendant. The premises were taken on rent by the defendant's father for commercial cum residential purposes and the same are being used for commercial cum residential purposes from the very beginning. The defendant inherited the tenancy from his father."

7. On behalf of the respondent, Sh. Rajiv Lochan Sharma who was the attorney and son of the respondent was examined. In his testimony as PW-1 he reiterated the stand taken in the plaint. The said witness admitted that initially the tenanted premises was let out to the father of the appellant Late Sh. Shadi Lal. He further deposed that initially rate of rent of front portion was Rs.60/- per month and that of rear portion was Rs.30/- per month.

8. Site plan Ex. PW-1/11 and 7 rent receipts Ex. PW-1/2 to Ex. PW-1/7 and Ex. PW1/10 were produced and duly proved at the trial by the respondent. Ex.PW1/2 pertains to the rent

received by the respondent for the month 1.4.1959 to 31.4.1959. Ex.PW1/3 pertains to the rent received for the period 1.7.1969 to 31.7.1969. Ex.PW1/4 and Ex.PW1/7 is the rent received for the period 1.1.1970 to 31.1.1970. Ex.PW1/5 is the rent received for the period 1.3.1959 to 31.3.1959. Ex.PW1/6 is the rent received for the period 1.6.1969 to 30.6.1969. As per rent receipts Ex.PW1/2, Ex.PW1/3 and Ex.PW1/4 rent @ Rs.60/- per month was received by the respondent. As per rent receipts Ex.PW1/5, Ex.PW1/6 and Ex.PW1/7 rent @ Rs.30/- per month was received by the respondent. Ex.PW1/10 pertains to the rent received by the respondent for the year 1998. Respondent has accepted rent @ Rs.400/- per month.

9. On behalf of the appellant, appellant himself stepped into the witness as DW-1. Besides reiterating the stand taken in the written statement appellant deposed that he has no intention of either subletting the tenanted premises or making any alterations or additions in the tenanted premises. No other witness was examined by the appellant.

10. No documentary evidence was led by the appellant.

11. Noting the statement of the appellant that he has no intention of either subletting the tenanted premises or making any alterations or additions in the tenanted premises, vide

judgment dated 15.11.99 the learned Trial Court passed a decree against the appellant restraining the appellant from subletting or otherwise parting with the possession of the tenanted premises as also from making any alterations, additions or constructions in the tenanted premises.

12. The main controversy between the parties was regarding the user of the tenanted premises.

13. After carefully analysing the evidence relating to the user of tenanted premises vide judgment dated 15.11.99 learned Trial Court has held that the evidence on record probablises that the front portion of the tenanted premises was let out for commercial purposes and that rear portion was let out for residential purposes. Accordingly, a decree was passed by the learned Trial Court in favour of the respondent restraining the appellant from changing the user of the tenanted premises. In arriving at the said conclusion the learned Trial Court has reasoned as under:-

I. Site plan Ex.PW1/11 shows that the said portions are two different units in as much as there is no connection between the two portions. Trial Court has further noted that there is considerable open space between the two portions.

II. Rent receipts Ex.PW1/2 to Ex.PW1/7 strengthens the testimony of the PW-1 that initially rate of rent of front portion was Rs.60/- per month and that of rear portion was Rs.30/- per month. And the fact that rate of rent of the two portions was different and that separate rent receipts were being issued in respect of two portions leads to an inference that the two portions were let out for different purposes as opposed to composite purposes.

III. The testimony of the appellant that a double bed was lying in the room situated in the rear portion of the tenanted premises is a pointer indicating that the rear portion was let out for residential purposes only.

IV. The fact that no documentary evidence was led by the appellant in support of his version weakens the case of the appellant.

14. Against the said judgment and decree dated 15.11.99 the appellant filed an appeal before the court of Additional District Judge limited to the decision of the learned Trial Court on the issue of user of tenanted premises.

15. After considering the contentions advanced by the appellant as also evidence on record the appellate court

concurred with the view taken by the Trial Court and thus dismissed the appeal.

16. In support of the present second appeal, counsel for the appellant had urged following three contentions:-

A. That Late Sh. Shadi Lal who was the original tenant was survived by the appellant and two daughters namely Smt. Kiran Lata and Smt. Seema Dhawan. That after the death of Sh. Shadi Lal, the tenancy rights in respect of the suit property were inherited by all the three legal heirs of the Sh. Shadi Lal i.e. appellant and his two sisters. Therefore the suit of the respondent was not maintainable for the reason sisters of the appellant were not impleaded as a party in the suit. In order to establish that tenancy rights were also inherited by his sisters the appellant has moved an application under Order XLI Rule 27 CPC for production of additional evidence. (C.M. No.531/03). Additional evidence sought to be produced is a rent receipt dated 14.7.88 showing Smt. Seema Dhawan and the appellant as tenants in the suit property.

B. That the courts below failed to attach due importance to rent receipt Ex.PW1/10. That the said rent receipt evidences that the rent @ Rs.400/- per month was paid in respect of both the portions of the tenanted premises. That the

fact that a single rent receipt is issued in respect of whole of the tenanted premises leads to an inference that both the portions of the tenanted premises were let out for composite purposes.

C. That the courts below failed to consider following three material facts:-

i) Rent of the tenanted premises was enhanced to Rs.400/- per month.

ii) At the time of the filing of the suit, appellant was paying rent @ Rs.400/- per month for whole of the tenanted premises as opposed to paying rent at different rates for two portions.

Iii) A single rent receipt was being issued by the respondent.

That even if it is assumed that front portion of the tenanted premises was let out for commercial purposes and rear portion was let out for residential purposes, the afore-noted three facts when coupled together suggest that subsequently a new tenancy was created where under both the portions were let out for composite purposes.

17. Objection pertaining to non-impleadment of his sisters was not pleaded by the appellant in his written statement.

18. Appellant has not even spoken a word about his sisters in his testimony as DW-1.

19. It is well settled that a party can be permitted to adduce evidence on the basis of the case pleaded by him in his pleading. In the decision reported as *Abubakar v Harun* AIR 1996 SC 612, the Supreme Court has observed as under:-

> ".....No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party....."

20. Be that as it may, it is relevant to note the decision of the Supreme Court reported as *H.C. Pandey v G.C. Paul* AIR 1989 SC 1470 wherein it was held as under:-

> "4. It is now well settled that on the death of the original tenant, subject to any provision to the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. In the present case it appears that the respondent acted on behalf of the tenants, that he paid rent on behalf of all and he accepted notice also on behalf of all. In the circumstances, the notice served on the respondent was sufficient. It seems to us that the view taken in Ramesh Chand Bone (supra) is erroneous where the High Court lays down that the heirs of the deceased tenant succeed as tenants in common. In our opinion, the notice under Section 106 of the Transfer of Property Act served by the appellant on the respondent is a valid notice and therefore the suit

must succeed."

21. The legal position relating to joint tenancy was laid down by the Supreme Court in the decision reported as *Ashok Chintaman Juker & Ors v Kishore Pandurang Mantri and Anr* AIR 2001 SC 2251. In the said decision, the Supreme Court has held as under:-

> "11. The question that arises for consideration in such cases is whether the tenancy is joint or separate. In the former case notice on any one of the tenants is valid and a suit impleading one of them as a defendant is maintainable....."

22. In view of law laid down by the Supreme Court in *H.C.Pandey* and *Ashok Chintaman*'s cases (supra), the fact that the daughters of Late Sh. Shadi Lal were not impleaded as a party in the suit filed by the respondent is of no consequence. At this stage I may deal with C.M. No.531/03. As noted above prayer made is to lead additional evidence to establish that the appellant's sister Smt. Seema Dhawan was a joint tenant in the suit property. There is no requirement of said evidence for the reason even if it is assumed Smt. Seema Dhawan was a joint tenant in the suit property it would make no difference. Even otherwise additional evidence is allowed to be produced where foundation has been laid in the pleadings to a matter in issue.

23. As regards the issue pertaining to non-appreciation of rent receipt Ex.PW1/10 by the courts below, suffice would it

be to note the following observations of the Supreme Court in the decision reported as *Vilas Pandurang Patil v State of Maharashtra* (2004) 6 SCC 158:-

> "18. .....It is true that when on the evidence brought on record two views are possible and the court has taken a view which is possible, interference by the appellate court would not be proper....."

24. From the evidence noted in para 13 above, the view taken by the learned Trial Court that front portion of the tenanted premises was let out for commercial purposes and that rear portion of was let out for residential purposes is possible. No fault could be found with the view taken by the learned Trial Court.

25. Therefore, even if it assumed that rent receipt Ex.PW1/10 is pointing towards a view contrary to the view taken by the learned Trial Court, the same is of no consequence for the reason there is sufficient evidence on the record supporting the view taken by the learned Trial Court.

26. On the issue pertaining to creation of new tenancy evidenced by enhancement of rent and change of manner of payment of rent, it is relevant to note the following portion of the testimony of PW-1.

> "Even though single rent receipt is being issued to the defendant, at present yet the purpose of letting of the portion Mark 'C' in the plan Ex.PW1/11 is commercial

and the purpose of letting of the room is residential and is being used for residential purposes by the defendant."

27. During cross-examination of PW-1, no suggestion was given to him that a new tenancy was created when rent was enhanced to Rs.400/- per month and a single rent receipt was issued in respect of both the portions.

28. The following passage occurs in the Halsbury's Laws of England (para 448, pf 354, Vol 27, Fourth Edition):-

> **"448. Variation of terms of lease** - Where the terms of the relationship between the landlord and the tenant are altered by agreement, it is necessary to decide whether the alteration amounts to the creation of a new tenancy upon the altered terms, and thus of necessity the surrender by operation of law of the previous tenancy, or whether the alteration merely continues the previous tenancy in a varied form. Certain agreed alterations necessarily involve the surrender of the previous tenancy and its replacement by a new tenancy. The only way in which new land may be added to the demised premises is by this process of surrender by operation of law of the old lease and the grant of a new lease to include both the old and the new premises. Equally the duration of a lease can only be extended by the surrender of the existing lease and its replacement by a new lease for the longer term. As a matter of law the parties can only achieve this intention by the fiction of a surrender and re-grant.
>
> Other agreed alterations do not necessarily involve a surrender and re-grant. If the parties wish they may increase the rent payable under a tenancy without creating a new tenancy; the old tenancy continues at the increased rent. The rent may be reduced in the same way. Other minor variations may be effected without a surrender and re-grant. Where the

> agreement between the parties does not affect the terms of an existing tenancy there is no reason to imply a surrender and re-grant. However, where the parties intend that their altered relationship is to amount to a new tenancy there will be a surrender of the previous tenancy.

29. In the decision reported as *Goppulal v Thakurji Shriji Shriji Dwarkadheesji & Anr* AIR 1969 SC 1291 four shops were let out to the defendant in 1944 on a rent of Rs. 150/- per month and two more shops were let out to him in 1945 on a rent of Rs. 65/- per month. In 1953 the defendant agreed to pay a consolidated rent of Rs. 251.8 per month for all the six shops. The plaintiff contended that by reason of the change in the quantum of rent a new tenancy had come into existence. The first two courts found that in 1953 there was no new contract of tenancy, that there was only an increase of rent and that the other terms and conditions of the tenancy remained unaltered. In para 5 of the said decision, the Supreme Court has observed as under:-

> "A mere increase or reduction of rent does not necessarily import the surrender of the existing lease and the grant of a new tenancy. As stated in Hill and Redman's Law of Landlord and Tenant, 14th ed., Article 385, p. 493:-
>
> > "But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where for instance, the parties make the

> change in the rent in the belief that the old tenancy is at an end."
>
> In the present case the first two courts on a review of the entire evidence came to the conclusion that the increase of rent did not import a new demise. This finding of fact was binding on the High Court in second appeal. The High Court was in error in holding that there was one integrated tenancy of the six shops."

30. In the decision reported as *N.M. Ponniah v Kamalakshmi Ammal* AIR 1989 SC 467 the question before the Supreme Court was whether a mere increase in rent would affect the terms of an existing tenancy so as to conclude a surrender of existing rights and re-grant of fresh rights. In the said decision, the Supreme Court has held as under:-

> "The textual passages extracted above and the decision of this Court in Gopulal's case set out lucidly that a mere increase or reduction of rent will not necessarily import a surrender of an existing lease and the grant of a new tenancy. We may add that if on account of the variation in the quantum of rent any consequential change is made regarding the time and manner of the payment of the rent it cannot have the effect of graver consequences being imported into the change of rent than what the parties had intended and warrant a finding by the Court, that the parties had intended to create a new tenancy in supersession of the earlier one or that by operation of law a new tenancy had come into existence."

31. In light of afore-noted two decisions, it is held that the mere increase of rent or issuance of one rent receipt for

both the portions does not mean that a new tenancy was created.

32. The appeal and C.M. No.531/03 are dismissed.

33. No costs.

December 7, 2007 PRADEEP NANDRAJOG
mm JUDGE